

MINORITY REPORT OF THE ELECTION CONTEST COMMITTEE

We, the undersigned members of the Committee, to whom was referred the matter of the Election Contest between Kayla Koether, contestant, and Michael Bergan, incumbent, for the position Representative for House District 55 of Iowa submit the following report:

Summary

Both the Iowa Constitution and Iowa Code prescribe the action members of the Iowa House of Representatives must take in this Election Contest: count every vote that is legally cast.

In the Election Contest filed by Kayla Koether in House District 55, there are 29 Iowans-- Republicans, Democrats, and No Parties -- who followed Iowa law and mailed their ballot before the November 5, 2018 deadline. However, their votes remain uncounted due to two Republican elected officials, Winneshiek County Auditor Ben Steines and Secretary of State Paul Pate.

Iowa law guarantees the right in open session of the court or tribunal trying the Election Contest to have the ballots opened. Ms. Koether is being denied this right by the Committee.

These facts in this Election Contest are indisputable:

- The ballots were mailed on time according to Iowa law.
- The ballots were received by the County Auditor before the legal deadline.
- The United States post office has already confirmed that the 29 ballots in question all bear an intelligent mail barcode traceable to a date of entry into the federal mail system not later than the day before the Election - thus, the 29 ballots should be counted.

Voting is a fundamental right guaranteed by both the United States and Iowa Constitutions. As State Representatives, we took an oath to "support the Constitution of the United States and the Constitution of the State of Iowa." Given this, it is the sworn duty of the members of the Iowa House of Representatives to protect the fundamental right to vote for these 29 Iowans.

However, nowhere in the Majority Report filed by Republican members of the Election Contest Committee does it give consideration to or even mention the fundamental right to vote, the Iowa Constitution, or the US Constitution. Instead of arguing to expand citizens' rights to cast votes, the Majority Report relies on ill informed legal reasoning to deny a fundamental right to 29 citizens.

The Majority Report ignores the equal protection violation that occurred in this Election Contest. While the 29 voters in Winneshiek County still wait to have their votes counted, twelve Fayette County voters in the same situation had their late-arriving ballots counted just days after the Election.

In addition to the callous disregard for the voting rights of 29 Iowans, the Majority Party members of the Committee also violated the due process rights afforded to Iowans and Ms.

Koether in our Constitution. They refused to allow the disenfranchised voters, Ms. Koether, or any other witnesses to testify before the Committee.

In refusing to protect the right of Iowans to vote or even conduct a fair hearing to gather facts and testimony, the Majority Report offered in this Election contest is a contrary to the rule of law. . We believe members of the Iowa House of Representative must do our sworn duty and follow the law: count every vote.

Standing

This Contest of the Iowa House District 55 ("HD55") Election between Kayla Koether ("Ms. Koether") and Representative Michael Bergan ("Mr. Bergan") comes down to 29 vote-by-mail ballots in Winneshiek County that were validly cast, but have not been counted. The votes include a split of Republicans, Democrats and No Parties. These 29 ballots should be counted because they were cast by eligible voters who followed all applicable laws and placed their ballots in the federal mail system by the deadline prescribed in the Iowa Code. These 29 ballots should be counted because they may change the outcome of the HD55 Election, given that just nine votes separate the candidates.

The Contest Committee Must Follow the Law and Count the Votes

The Iowa Constitution and Iowa Code outline voting rights and rules. The Contest Committee must uphold Iowa law and open and count the 29 ballots. All Iowa voters have a right for their validly-cast votes to be counted, and Ms. Koether has the right to request that the Contest Committee follow the statutory contest procedures to open and count the 29 ballots. (Iowa Code Chapter 57.5) (2018).

Voting is a fundamental right, guaranteed by both the United States and Iowa Constitutions. *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014) (citing *Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978)). "It occupies an irreducibly vital role in our system of government by providing citizens with a voice in our democracy and in the election of those who make the laws by which all must live. The right to vote is found at the heart of representative government and is 'preservative of other basic civil and political rights.'" *Chiodo*, 846 N.W.2d at 848 (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); accord *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). If the voter follows the voting laws, then his or her vote should be counted. All voters should be treated equally. Here, 29 voters are being treated differently, and by refusing to count their votes, the government is knowingly and intentionally disenfranchising those voters.

These 29 Winneshiek County voters followed the law and held up their end of supporting democracy. The fact that their ballots were received after Election Day does not invalidate the voters' actions the law already prescribes the last date absentee ballots can be received. Suggesting that this Contest will lead to ballots being returned weeks later is hyperbolic partisan

grandstanding. Some have also suggested that these voters should have voted earlier or in person, but blaming the voters undermines the rule of law and decency—especially when these voters' actions were well within the letter of the law. The legislature and this Committee, should be advocating for the counting of these ballots and defending a fundamental right, not using suspect legal arguments to disenfranchise voting citizens.

Prior District Court action has proven that 29 ballots were in the US postal mail system as confirmed by the intelligent barcodes on the ballots. The Contest Committee should have acted to request the ballots from the Winneshiek County Auditor to be opened and counted to determine the outcome of the Election pursuant to Iowa law.

These 29 voters are being punished because they do not live closer to a postal hub, because the ballots were not delivered prior to Election Day, and because the USPS did not use a stamp-canceling postmark on the ballots. None of these facts, however, renders their ballots in violation of Iowa election law. The Winneshiek County Auditor has confirmed through review of the intelligent mail barcode for each ballot that they were timely placed in the mail. These 29 voters did what they were supposed to do: they voted and they put their ballots into the federal mail system before Election Day. Their fundamental right to vote should not be denied by this Committee. This Contest Committee must follow Iowa law and open and count the ballots.

The Secretary of State's Handbook that provides guidance to county Auditors states "In order to be valid, ballots received after Election Day must be clearly postmarked before Election Day or bear an intelligent mail barcode traceable to a date before Election Day." The Secretary of State is refusing to follow his own guidance.

Iowa Code 57.17 (2) is clear...

In order for the ballot to be counted, the return envelope must be received in the commissioner's office before the polls close on election day or be clearly postmarked by an officially authorized postal service or bear an intelligent mail barcode traceable to a date of entry into the federal mail system not later than the day before the election and received by the commissioner not later than noon on the Monday following the election.

While members of the Majority Party may argue legislative intent, they do not get to assume intent for all 150 duly elected Senators and Representatives.

We find that the Contest Committee failed to follow the Iowa Constitution and requires the Iowa House to follow the law when resolving an Election Contest.

Due Process

The Iowa Constitution gives persons the right to Due Process in civil proceedings. IOWA CONST. ART. I, § 9. The Iowa Constitution further gives candidates for public office the right to

contest an election if the results or process are questioned. IOWA CONST. ART. III, § 7. Refusing Ms. Koether the opportunity to present evidence deprives her of her right to due process of law under the Iowa Constitution. *In the Interest of A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994) (stating a fundamental component of due process is the opportunity to be heard).

The right to Due Process historically has been construed by Iowa courts to allow the parties to a case or controversy to provide evidence to the tribunal trying the case in order to give a full and fair picture of the issues before the tribunal. *Id.* The laws already provide for parties to contest the Election, and this Committee cannot limit Ms. Koether's constitutional rights. The role of this Committee is to make a fair determination of the outcome of the case.

Oral arguments from counsel are not evidence. Oral arguments are simply an overview of the issues in a case from the attorney's point of view. Without a record of evidence comprised of exhibits and testimony from witnesses, the record in front of the Committee is only hearsay and facts not proven to be accurate or reliable. Without creating a record of evidence, including testimony, this Committee will be unable to make a fully informed, impartial decision because the decision will be based on the attorneys' views of the facts and information. Oral arguments are not intended to be the only evidence a tribunal hears. Oral arguments are intended to be based on the record of evidence presented. Due process allows for the parties to not only present their own evidence, but to refute and contradict the opposing party's evidence to allow the tribunal to make a full and impartial decision on the case or controversy.

Had the Committee acted properly and allowed the parties or Committee members to call witnesses to provide testimony we, as minority members of the Committee, would have called the following:

1. Iowa Secretary of State, Paul Pate.
2. Former State Director of Elections, Dawn Williams.
3. Winneshiek County Auditor, Benjamin Steines and staff or volunteers.
4. Fayette County Auditor, Lori Moellers and staff or volunteers.
5. Iowa State Association of County Auditors, President Travis Weipert.
6. A United States Postal Service Employee.
7. Iowa House District 55 Presumed Representative, Michael Bergen.
8. Democratic Candidate for Iowa House District 55, Kayla Koether.
9. Bouthsakone McCain and her mother.
10. Three Winneshiek County voters whose ballots remain uncounted but were legally cast.

While testimony was not allowed, we do know what some of the disenfranchised voters have said in public statements regarding this Election Contest.

"The people whose votes are being denied have every right to explain their stories to the House Committee, and the Committee has an obligation to hear what we have to say and not to deny that. This is Iowa--these are your neighbors. The Committee should have to explain to me why there's a reason not to count them. Every vote should count."

My rights are being trampled. I just want it to be fair. This is America! This isn't some third-world country where they burn ballots that they don't want counted. The House Committee owes it to the people to count every vote. They can't justify not counting the votes." —Bob Wilson from Decorah, Iowa

"As a voter who was not allowed a chance to participate in the election process, I think it's an extraordinary disappointment to be told by the governing body that will decide how to resolve this problematic issue that it is not interested in my participation once again. How can said body make a sound decision without comprehension of context and the impact this problem has on its constituents?"-- Liam Murphy

"I was shocked when I heard my vote wasn't counted. I've been living with disabilities since 2002 and have been voting absentee for years. There has never been a problem—until this year. Whether it is a close contest like this one, or not, I still deserve that chance to register my beliefs and my feelings. I am part of the 29 forgotten, or at least marginalized people, who don't seem to have a voice any longer, even though we did everything asked of us in the proper way. Voting is one of the utmost privileges of being an American.

I consider voting to be not only my privilege and responsibility, but also my right as an American citizen. Every vote is important as evidenced in this close contest. I expect the legislature to do the right thing and put partisan politics aside. My vote must be counted and my voice heard, as I did all that was legally required of me. To deny me my constitutional right to participate in this process would be a true injustice. Don't let justice take a back seat to politics. Voting is one of the utmost privileges of being an American, living in a society where, at least until recently, people could own their own destiny." --Kathleen Kuennen

"It's not right that the committee wouldn't make time to hear from us. I was devastated when I got the phone call informing me that Lowell's and my absentee votes hadn't been counted. We mailed them on time. It's not my fault they didn't get a postmark. They have the barcode at the bottom of the envelope that proves whether they were in the post office before the deadline. If they have that barcode, they should be opened and counted.

A few years ago we used to have a polling site right here in Frankville. It closed down, so now we have to go to Decorah. To get to the polling place is about 14 miles. With Lowell being disabled it has been easier for us to vote absentee.

We trusted the system. We trusted that absentee voting would work. It's our right to say who we want in the legislature representing us. When that right is taken away, that's just wrong. The legislature should make sure the votes are opened and counted."--Laura Staake

It's disappointing that the voters, who are the ones being disenfranchised by this Contest Committee did not have a chance to have their voices heard. This Committee's lack of action has set a disturbing precedent for future legislatures to follow. The one hearing and perfunctory report make it clear that the Majority had no intention of giving Ms. Koether or the voters Due Process.

We find the the Committee's failure in applying Iowa law, denied the Contestant Kayla Koether and the voters of House District 55 with their due process rights necessary to ensure a proper hearing and consideration of the evidence to properly determine the Election outcome. The Committee Majority refusal to hear evidence shows they acted in haste with their minds clouded by their political power to seek an outcome as they see fit, rather than as led by evidence that was not allowed to be presented to the Committee.

Equal Protection

Unlike the 29 disenfranchised voters in Winneshiek County, twelve Fayette County voters had their late-arriving ballots counted, despite the lack of a postmark. The intelligent mail barcodes on the twelve ballots were not checked, and the dates on which they were placed into the federal mail system was not verified in any way. Because voters were treated differently based on which county auditor counted their votes, there is an Equal Protection violation in the HD55 Election.

The 29 voters in Winneshiek County have the same right to have their vote counted in the HD55 Election as the voters in Fayette County, but they have been denied this right with no consideration by the Winneshiek County Auditor and the Iowa Secretary of State. The Majority Party seems to have no concern about the votes counted in Fayette County, where Mr. Bergan gained a net of two votes. As election officials, county auditors and the Iowa Secretary of State have the explicit duty to carry out the Iowa Constitution and the Iowa Code to ensure that all eligible voters who follow the law are able to exercise their fundamental right to vote. This Contest Committee is now in the position to correct that error and follow Iowa law.

We know that the Secretary of State (Mr. Pate) advised the Winneshiek County Auditor to not count the ballots, even though similarly situated ballots were counted in another County in the House District. However, we also know Sec. Pate has been derelict in his official duties on at least two other occasions when failing to count 5,842 votes in the 2016 General Election and failing to timely file notice on a Constitutional Amendment last year.

Conclusion

The Majority's decision of this Committee to not act in the interest of democratic principles and to not follow Iowa law will have a negative impact in every corner of the state. Voters and

constituents will lose faith in their institutions and be forced to settle with the belief that the Iowa House does not value all voters, regardless of party affiliation.

From the beginning the members of the Minority Party have acted in good faith without partisan intention, but simply to have the will of the voters and all votes counted. *Count Every Vote*. As with custom over the last few years, the Majority Party has put another hurdle in front of voters. Iowans will now worry that their absentee ballot may not be counted even if legally cast, discouraging them from utilizing that method of voting, many of which is their only way of having their voice heard. Between limiting the number of days to vote early and now throwing out 29 legally cast ballots, it is difficult to not jump to the conclusion that the Majority Party wants fewer people voting. The Majority Party is sending a message that they value certain Constitutional Rights more than others.

This Committee recommends the House grant Ms. Koether and the voters of House District 55 their constitutional rights and rights guaranteed in Iowa Code to open and count the ballots that have been legally cast.

1. _____
WOLFE of Clinton

2. _____
MEYER, B. of Polk

3. _____